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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 1065 of 2001

Appellant: Bhupendra @ Motu Patle

Versus

Respondent: State of Chhattisgarh,

POST FOR JUDGMENT ON 3rd October, 2007

Sd/-
Dhirendra Mishra
Judge

(44)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.1065 of 2001

Appellant/ Accused (In Jail)	Bhupendra @ Motu Patle, aged 22 years, S/o Kapoor Chand Patle, resident of Village Tema, P.S. Paraswara, Distt. Balaghat, now residing at Pannalal's house, Paragaon, P.S. Gobra, Nawapara, Distt. Raipur.
	Vs
Respondent/ Non-applicant	State of Chhattisgarh, through the P.S. Gobra, Nawapara, Distt. Raipur, (C.G.)

Present:

Mr. Kishore Bhaduri, Advocate — For the appellant

Mr. Neeraj Mehta, Panel Lawyer — For the respondent

J U D G M E N T

(Delivered on 03.10.2007)

Per Dhirendra Mishra, J

1. This criminal appeal is directed against the judgment of conviction and order of sentence dated 5th October, 2001 passed by the learned Special Judge under the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 in Special Sessions Trial No.2/2000 whereby the learned Special Judge has convicted the appellant under Sections 342 & 376 of the Indian Penal Code (for short 'IPC') and sentenced him to undergo R.I. for 6 months and R.I. for 10 years and to pay a fine of Rs.10,000/-, in default of payment of fine to undergo additional R.I. for 6 months respectively.

2. Case of the prosecution, in brief, is that on 28.1.2000 at about 1400 hrs the prosecutrix (PW-1) belonging to Scheduled Caste community lodged a report in the Police Station Gobra, Nawapara mentioning therein that on that day at about 12.00 noon the appellant gave her Rs.10/- to bring envelope from the shop, whereupon she went to his house with the envelope. However, while she was returning, the accused dragged her, made her lie on the bed, closed the door, gagged her mouth with the help of his hand and raped her after undressing her. She returned to her home weeping and narrated about the incident to her Bhabi Santra Bai, mother Kerabai and thereafter has come to lodge the report with her parents.

3. During investigation the prosecutrix was sent for medical examination to Lady Doctor, Navapara where Dr. (Smt.) Sarla Jaiswal (PW-7) examined her and gave her report of Ex.P-3. Wearing apparels of the prosecutrix i.e. underwear and frock were taken into possession vide Ex.P-2 and the same were sent for examination to the doctor, whereupon, Dr. (Smt.) Sarla Jaiswal (PW-7) referred the clothes for chemical examination vide Ex.P-4. Appellant was also sent for medical examination vide Ex.P-5 and the same was admitted by the appellant during trial. The prosecutrix was referred to the medical college for examination and her medico legal examination report is Ex.P-6 and this document has also been admitted by the appellant during trial. Caste certificate (Ex.P-10) of the prosecutrix was also seized. Underwear of the accused was seized vide Ex.P-16 and pieces of cloth and bed-sheet were seized from the appellant vide Ex.P-17. Seized articles being underwear of the accused, underwear, frock and vaginal slides of the prosecutrix were sent for chemical examination to Forensic Science

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Laboratory, Raipur and the report of Forensic Science Laboratory dated 25.4.2000 is available on record.

4. After completing investigation, charge sheet was filed against the appellant in the Court of learned Judicial Magistrate 1st Class, Raipur, who in turn committed the case to the Court of learned Sessions Judge, Raipur and the same was received on transfer by the learned Special Judge for trial. During trial, the prosecution examined 11 witnesses and thereafter, statement of the accused was recorded under Section 313 of the Code of Criminal Procedure (for short 'Cr.P.C.') wherein the appellant pleaded innocence & false implication and stated that father of the prosecutrix Hemlal worked with him in the Hanuman Agro factory, at the time of strike he was retained by his employer on employment, whereas, Hemlal was removed from the service and for this reason he has been falsely implicated in the crime. He has also examined one witness namely Pannalal (DW-1) in his defence.

5. The trial court has convicted the appellant with the finding that:-

   a) The prosecution by the evidence of prosecutrix (PW-1), her mother Kerabai (PW-2), her father Hemlal (PW-3), Santrabai (PW-4) & Kailash Bandhe (PW-5) has proved beyond reasonable doubt that the appellant wrongfully confined the prosecutrix in his house against her wishes.

   b) The prosecution has established beyond reasonable doubt the offence under Section 376 of the IPC against the appellant.

However, the trial court has acquitted the appellant from the charge under Section 3 (2) (5) of the Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989.

6. Learned counsel for the appellant argued that the basic ingredients of the offence of rape, as defined under Section 375 of IPC are that there must be penetration of the male organ in the female organ. No offence under Section 376 can be made unless there was penetration to some extent and in absence of penetration to any extent it would not bring the offence of the appellant within the four corners of Section 376. Referring to the statement of the prosecutrix it is argued that the prosecutrix has claimed that the accused inserted his male organ in her vagina and raped her as a result of which blood started oozing and this fact was narrated by her to her Bhabi Santrabai. She has also claimed that after completely penetrating his male organ the accused committed rape for a period of half an hour and she suffered acute pain, there was abrasion over her vagina and blood came out. But, the medical examination report of Ex.P-6 given by Dr. Seema Soni does not corroborate the version of the prosecutrix. However, the trial court in Para 36 of its judgment has brushed aside the report of Ex.P-6 with an observation that Dr. Seema Soni is a RMO and only MBBS doctor, the prosecutrix had not cooperated in her internal examination when she was examined by Dr. Sarla Jaiswal, however, it is surprising that only after 1 hr 10 min after the examination of Dr. Sarla Jaiswal, the prosecutrix agreed for internal examination by Dr. Seema Soni. He further argued that in the absence of medical corroboration of the version of the prosecutrix, the trial court ought to have accepted the defence of the appellant that he has been falsely implicated in a false case on account animosity, which

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is reflected from the statement of the accused as also from the statement of the defence witness Pannalal. It is also argued that the prosecutrix has admitted in her cross-examination that some whitish substance was applied by her mother on her private part.

Reliance is placed on **Takreshwar Sahu versus State of Bihar (Now Jharkhand)[1]; Kishan Lal Versus State of Rajasthan[2].**

7. On the other hand learned counsel for the State supporting the impugned judgment contended that the version of the prosecutrix is corroborated by the statement of other independent witnesses as also from the FSL report, which is positive with regard to her vaginal slides. Reliance is placed on in the matter of **State of Tamil Nadu Versus Ravi @ Nehru[3]**

8. I have heard learned counsel for the parties. I have perused the impugned judgment as also the evidence available on record.

9. The prosecutrix (PW-1), who is aged about 11-12 years according to Radiologist examination report, has stated that when she went with the envelope called by the appellant in his house, he caught her hand, tied her hands & legs with a rope, closed the door, made her lie on the bed, inserted cloth in her mouth and thereafter committed rape with her after undressing her. He inserted his male organ in her vagina and thereafter she returned weeping. Her mother was sitting, at that time blood was oozing from her body. She did not reply to the query of her mother as to how blood was oozing, whereupon, her mother chased to beat her, at that

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[1] (2006) 8 Supreme Court Cases 560
[2] [2005 (2) AC 51 (Raj)]
[3] 2006 (7) SBR 264

time her Bhabi Santrabai returned after taking bath and she narrated the incident to her. The persons of the vicinity also came to know. Thereafter she went to lodge the report with her father. She was taken for examination to D.K. Hospital, Raipur. In the cross-examination she has admitted that she does not know the meaning of 'Balatkaar', however, she has claimed that the accused committed rape was written in the FIR as per her statement. Omissions regarding tying her hands & legs & inserting cloth in her mouth have been pointed out in her report of Ex.P-1 and diary statement of Ex.D-1. She has also stated that the accused penetrated his male organ completely, she sustained abrasion over her private part and her mother applied some white substance over her vagina, as blood was oozing from there.

10. Kerabai (PW-2), mother of the prosecutrix, has also made similar statement. She has stated that she saw that her daughter was weeping and blood was oozing from her body which stained her clothing. She narrated the incident to Santrabai and thereafter, the girl was questioned in presence of Devchand, Kailash, Panna, her father and other persons of the locality. PW-3 Hemlal, PW-4 Santrabai & PW-5 Kailash Bandhe have also made similar statement as of Kerabai (PW-2). PW-3 Hemlal has admitted that in the case of rape the Government pays compensation of Rs.25,000/-, however, he denied the suggestion that he had some quarreled with the appellant and therefore, he has falsely implicated him in the offence. Santrbai (PW-4) has also stated that the prosecutrix narrated her about the incident in presence of other witnesses and at that time she was profusely bleeding and her clothes were stained with blood.

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11. The only question for decision of this appeal is that whether the trial court was justified in convicting the appellant on the basis of solitary testimony of the prosecutrix, which is not corroborated by the medical evidence.

12. The prosecutrix has categorically stated in her statement that accused caught her hand, gagged her mouth by inserting cloth, made her lie on the bed, tied her hands & legs by rope, bolted the door and thereafter raped her after undressing himself and the prosecutrix. She has also stated that he inserted his male organ in her vagina and raped her for half an hour as a result of which she suffered acute pain and blood started oozing from her vagina which stained her clothes. In the cross-examination, she has stated that she sustained abrasion injury over her vagina and she had shown the same to her mother who applied some white substance over the injury. Other witnesses i.e. mother & father of the prosecutrix, Santrabai (PW-4), Kailash Bandhe (PW-5) have also claimed that the girl was bleeding profusely and her clothes were stained with blood.

13. In the light of assertion of the prosecutrix, if her medical examination report conducted by Dr. Sarla Jaiswal (PW-6) and Dr. Seema Soni are seen it would be evident that they do not corroborate the statement of the victim as also other prosecution witnesses. The prosecutrix was firstly examined by Dr. Sarla Jaiswal (PW-7), however, the prosecutrix did not cooperate with her in her internal examination and therefore, she referred her to the Gynecologist for examination as also for radiological examination. Thereafter, the prosecutrix was examined by Dr. Seema Soni, whose report of Ex.P-6 categorically mentions absence of any external or internal injury over

her private part. Dr. Seema Soni did not find any injury on the thighs and genitals of the prosecutrix, her hymen was intact which admitted only tip of little finger, no tear, no bleeding, no tenderness was found in the examination and accordingly it has been opined that no definite opinion can be given regarding rape.

14. In the matter of Takeshwar Sahu[1] in para 10 it has been held that for the offence of rape, as defined under Section 375 and punishable under Section 376, proof of penetration to some extent is necessary. Penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. In Para 13 it has been held that in order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact.

15. In the matter of Aman Kumar and another Versus State of Haryana[4] in Para 7 it has been observed thus:-

> "Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen

[4] (2004) 4 Supreme Court Cases 379

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offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus, a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence."

16. In the matter of Kishan Lal Versus State of Rajasthan[2] considering the fact that no scratches or injury on any part of the body of the prosecutrix was found, her hymen was not violated and there was no injury even on the labia majora and minora, the version of the prosecutrix that there was a complete sexual intercourse was not believed and it was held that there was no slightest penetration.

17. In the matter of State of Tamil Nadu Vs. Ravi @ Nehru[3] it has been held that the conviction could be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. Considering

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the fact of that case that there was no evidence or even suggestion that the accused had been falsely implicated because of animosity and further considering that hymen was ruptured and that there was a cut wound with blood stains at the bottom portion of the penis of the accused, opinion of the doctor that such injuries are usually caused when the penis was forced into vagina, the Hon'ble Apex Court has held that the High Court was not justified in allowing the appeal only on the basis of absence of injuries over the person of the prosecutrix, aged 8 years, and conviction recorded by the trial court was restored.

18. In the light of the above principles of law, if we examine the facts of the present case, it is evident that the prosecutrix is a girl aged 11-12 years, there is no medical evidence as regards the shape or orifice or elasticity, whether increased or less elasticity, no injury was found either on her body or on her private part, her hymen was intact and there is no evidence that there was any tenderness, reddishness present over labia majora and minora. Therefore, it cannot be safely inferred that there was slight penetration and as such, the version of the prosecutrix that there was complete sexual intercourse cannot at all be believed, as her version is contradicted by the medical evidence. In view of the above medical evidence, from the improvements made by the prosecutrix during her examination before the court, as pointed out in the cross-examination, the only inference which can be drawn is that she was the tutored witness.

19. So far as the observation of the trial court for disregarding the report of Ex.P-6 given by Dr. Seema Soni, the same is uncalled for, particularly when the accused admitted the prosecution documents under Section 294 of

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the Cr.P.C. Even the doctor was not examined by the trial court and the report has been dismissed with disparaging remarks. The positive report of FSL has also been taken into account as a corroborative piece of evidence to the version of the victim, however, considering the defence of the appellant & statement of defence witness, solely on the basis of the positive FSL report the appellant could not be convicted for the above offence, particularly, when the version of the prosecutrix does not inspire confidence and when she appears to be a tutored witness, as there is evidence available on record that after the incident the mother of the prosecutrix has applied some white substance on her private part before she was taken to the police station for lodging the report.

20. In the result, for the foregoing reasons, the appeal preferred by the appellant is allowed. His conviction and sentence under Sections 342 & 376 of the IPC are hereby set aside and he is acquitted of those charges. It is stated that the appellant is in jail since the date of judgment i.e. 5.10.2001, therefore, it is directed that he be set at liberty forthwith, if not required in any other case

Sd/-
Dhirendra Mishra
Judge

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